Hastings Law Journal

Volume 41 | Issue 2 Article 5

1-1990

A Continuing Source of Aggravation: the Improper Consideration of Mitigating Factors in Death Penalty Sentencing

Joshua N. Sondheimer

Note

A Continuing Source of Aggravation: The Improper Consideration of Mitigating Factors in Death Penalty Sentencing

by
JOSHUA N. SONDHEIMER*

The determination of whether a defendant convicted of a capital crime will be executed is made, under nearly all of the current death penalty statutes in the United States, by a judge or jury[1] weighing the "mitigating factors"[2] in the case against the "aggravating factors."[3] If the factors aggravating the gravity of the crime outweigh those factors calling for a sentence less than death, the sentencing authority is then permitted,[4] and in some states required,[5] to impose the death penalty.

---

* B.A. 1986, University of California, Berkeley; Member, Third Year Class.

1. Although the majority of states provide for jury sentencing in capital cases, some states allow the judge to be the sentencing authority, or to override the recommendation of an advisory jury. Gillers, *Deciding Who Dies*, 129 U. PA. L. REV. 1, 14 (1980); *see, e.g.*, FLA. STAT. ANN. § 921.141(3) (West 1985) (judge has final authority to impose or withhold death sentence notwithstanding jury recommendation). *See also* Spaziano v. Florida, 468 U.S. 447 463 (1984) (thirty of the thirty-seven death penalty jurisdictions give ultimate sentencing authority to the jury.) In *Spaziano,* the Supreme Court determined that jury sentencing is not constitutionally requried. *Id.* at 457-65.

2. "Mitigating factors," also called mitigating circumstances; are any aspects of a defendant's character, background, record, offense, or any other circumstances proffered by the defendant that, although not constituting excuse or justification for the crime, might serve as a basis for a sentence less than death. *See* Lockett v. Ohio, 438 U.S. 586, 605 (1978). Typical mitigating factors include extreme mental illness, youth, or a lack of prior criminal activity. *See, e.g.*, FLA. STAT. ANN. § 921.141(6) (West 1985).

3. "Aggravating factors," or aggravating circumstances, are those facts about the defendant's record or the offense that militate in favor of imposing capital punishment upon a capital defendant. *See, e.g.*, GA. CODE ANN. § 27-2534.1 (Harrison 1988); FLA. STAT. ANN. § 921.141(5) (West Supp. 1989).

4. *See, e.g.*, FLA. STAT. ANN. § 921.141(3) (West 1985) (death sentence optional though aggravating circumstances outweigh mitigating circumstance).

5. *See, e.g.*, CAL. PENAL CODE § 190.3 (West 1988) (trier of fact "shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances"). The California Supreme Court has rejected a mechanistic construction of the words "outweigh" and "shall" in the statute, stating that the law "should not

Even in those states that do not direct the sentencer to weigh mitigating and aggravating factors, the sentencer's determination depends nevertheless upon consideration of the aggravating and mitigating circumstances in the case.[6]

Implicit in these statutes is the assumption that aggravating and mitigating circumstances are readily distinguishable and amenable to categorization. As perceptive commentators and judges have recognized, however, jurors may view certain mitigating factors as factors aggravating the gravity of a capital crime. Consequently, jurors may, and sometimes do, improperly weigh mitigating factors on the side of aggravation, altering the proper balance between aggravating and mitigating factors in a particular case and depriving defendants of what the United States Supreme Court has declared to be their constitutional right to have each mitigating factor considered "as a mitigating factor."[7] In this Note, this problem is called "improper consideration."

In its June 1989 decision in *Penry v. Lynaugh,*[8] the United States Supreme Court acknowledged that certain mitigating evidence may be susceptible to conflicting interpretations. As the Court observed, evidence of defendant Penry's mental retardation and history of physical abuse, in the absence of proper guidance to the jury, constituted a "two-edged sword" because it "diminish[ed] his blameworthiness for his crime even as it indicate[d] that there is a probability that he will be dangerous

be understood to require any juror to vote for the death penalty unless, upon completion of the 'weighing' process, he decides that death is the appropriate penalty under all the circumstances." People v. Brown, 40 Cal. 3d 512, 541, 709 P.2d 440, 456, 220 Cal. Rptr. 637, 653 (1985). The constitutionality of the mandatory form of the California statutes, however, is currently on review before the United States Supreme Court. People v. Boyde, 46 Cal. 3d 212, 758 P.2d 25, 250 Cal. Rptr. 83 (1988), *cert. granted,* 109 S. Ct. 2447 (1989).

6. *See* TEX. CODE CRIM. PROC. ANN. § 37.071 (Vernon 1981 & Supp. 1989), *construed in* Jurek v. Texas, 428 U.S. 262, 271-74 (1976); and OR. REV. STAT.§ 163.150 (Supp. 1988) *as amended by* H.B. 2250, § 135a, 1989 Legislative Session (adding to Oregon statute the requirement that the jury consider the extent to which mitigating circumstances may reduce defendant's "moral culpability or blameworthiness for the crime"). The eighth and fourteenth amendments require that states provide a mechanism for the jury to consider and act upon any relevant mitigating evidence, Lockett v. Ohio, 438 U.S. 586, 604 (1978), and that the sentencer's discretion to impose death be channeled by a consideration of factors that justify execution. *See* Gregg v. Georgia, 428 U.S. 153, 197-98 (1976).

7. Lockett v. Ohio, 438 U.S. 586, 604 (1978). *See, e.g.,* Miller v. State, 373 So. 2d 882, 886 (Fla. 1979) (because the heinousness of the defendant's crime was a direct consequence of his mental illness, the mental disorder could not be used in aggravation); People v. Jackson, 28 Cal. 3d 264, 353, 618 P.2d 149, 187, 168 Cal. Rptr. 603, 641 (1980) (Bird, C.J., dissenting) (arguing that California's death penalty statute fails to identify factors as aggravating or mitigating, so sentencing authorities may reach different conclusions about the nature of specified factors), *cert. denied,* 450 U.S. 1035 (1981); *see also* Liebman & Shephard, *Guiding Sentencer Discretion Beyond the "Boilerplate": Mental Disorder as a Mitigating Factor,* 66 GEO. L.J. 757, 821 n.276 (1978) (mitigating circumstances may relate to aggravating circumstances where both result from the abnormal mental condition).

8. 109 S. Ct. 2934 (1989).

in the future."[9] The Court imposed a case-specific remedy for this problem, however, failing to recognize the doubt this admission casts on the reliability of modern capital sentencing schemes. Mental illness is a principal example of a mitigating factor that may lead to the problem of improper consideration. Although the Anglo-American system of criminal justice without exception has viewed mental illness as a factor militating leniency in criminal punishment,[10] this Note will demonstrate that sentencers can and do weigh this factor on the side of aggravation. This may occur, for example, when a prosecutor argues that a defendant's impaired mental abilities render him incapable of conforming his aggressive conduct and that he therefore poses a continuing threat to the community.[11]

Other factors intended to function solely as mitigating circumstances may be viewed instead as aggravating. As the *Penry* Court recognized, evidence of a defendant's mental retardation or deprived and abusive childhood, either of which should favor leniency, may also be considered by the sentencer as aggravating circumstances because they suggest future dangerousness. Age, intoxication, or conditions such as pathological alcoholism may also be seen as aggravating circumstances, either independently or because of a substantial causal link to an aggravating factor. Because this issue has arisen most often in connection with a defendant's mental illness, this Note focuses on mental illness.

In *Zant v. Stephens*[12] the United States Supreme Court indicated for the first time that it recognized the potential problems posed by ambiguous[13] mitigating factors.[14] The Court stated in *dictum* that the Constitution could not tolerate a *state* considering mental illness as a factor in aggravation. The Court stated that due process would be violated if a state "attached the 'aggravating' label to . . . conduct that actually should militate in favor of a lesser penalty, such as perhaps the defendant's mental illness."[15]

9. *Id.* at 2949.

10. *See infra* notes 59-60 and accompanying text; Zant v. Stephens, 462 U.S. 862, 885 (1983).

11. *See, e.g.*, Penry v. Lynaugh, 832 F.2d 915, 922-26 (5th Cir. 1987), *aff'd in part, rev'd in part,* 109 S. Ct. 2934 (1989) (defendant's mental retardation evinced inability to learn from his mistakes and thus related to defendant's future dangerousness); Miller v. State, 373 So. 2d 882, 885-86 (Fla. 1979) (judge impermissibly used defendant's mental illness and resulting propensity to commit violent acts as an aggravating factor).

12. 462 U.S. 862 (1983).

13. This Note refers to these factors as "ambiguous" because their nature as factors that should mitigate rather than aggravate punishment may not be self-evident to a jury. The use of the term "ambiguous" is not intended to suggest that these factors might properly be considered as aggravating factors.

14. *Id.* at 885.

15. *Id.* (citing Miller v. State, 373 So. 2d 882, 885-86 (Fla. 1979)).

Whether this strict prohibition against the use of mitigating circumstances as aggravating factors applies to situations in which the sentencer, rather than the state, attaches the improper "aggravating" label has not yet been made clear. The *Stephens* Court's *dictum* and particularly the Court's reference to a Florida case invalidating a death sentence due to the judge's improper consideration of the defendant's mental illness as an aggravating factor, suggests that improper "labeling" by the sentencer also would violate due process.

This Note argues that, with respect to these "two-edged" mitigating factors, modern death penalty schemes provide little more in the way of jury guidance than the Georgia statute struck down in *Furman v. Georgia*.[16] Therefore, the schemes perpetuate the irrationality and potential for arbitrariness that the Court has held violate the eighth[17] and fourteenth[18] amendments' prohibitions against cruel and unusual punishment.[19]

Section I of this Note examines the constitutional requirements established by the Supreme Court for capital punishment statutes. Section II explores how the problem of misapplication of mitigating factors occurs under several states' death sentencing schemes. Section III argues that modern death penalty statutes, by condoning the misapplication of mitigating factors, do not meet the Supreme Court's minimum requirements for constitutional death penalty sentencing. Finally, Section IV identifies several solutions that may help prevent the deprivations of capital defendants' constitutional rights when judges and juries consider mitigating factors as aggravating evidence.

16. 408 U.S. 238 (1972) (per curiam).

17. The eighth amendment states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

18. The fourteenth amendment provides, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

19. The Court has emphasized the eighth amendment in analyzing the constitutionality of the death penalty and death penalty procedures. *See* Gillers, *supra* note 1, at 1, 8-11. Justice Stewart, however, concurring in *Furman* noted a "procedural content" in the eighth amendment that was required to prevent the wanton and freakish imposition of the death penalty. *Furman,* 408 U.S. at 309-10 (Stewart, J., concurring). The 1976 Cases and subsequent decisions make clear that the special nature of the death penalty requires a heightened concern for procedural due process. *See infra* notes 21-57 and accompanying text.

I. "Super Due Process for Death":[20] Constitutional Death Sentencing

Prior to the Supreme Court's landmark decision in *Furman v. Georgia,*[21] juries in death penalty cases typically were given unbridled freedom to impose or withhold the penalty of death. Decisions often were made solely on the basis of evidence presented during the guilt phase of the criminal trial.[22] The results of this standardless sentencing system are notorious.[23] In the eyes of the Justices themselves, the death penalty was being imposed at least in an arbitrary or "freakish"[24] manner, if not actually discriminatorily and capriciously,[25] against people of color and the poor.

After *Furman* repudiated statutes that left the death decision to the untrammeled discretion of the jury, the Supreme Court sought, in a series of five companion cases decided in 1976 ("the 1976 Cases"), to positively identify the requirements of a constitutional death sentencing procedure.[26] The Court announced these new principles when reviewing

20. This subtitle has been borrowed from Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death,* 53 S. CAL. L. REV. 1143 (1980).

21. 408 U.S. 238 (1972).

22. *See* W. WHITE, THE DEATH PENALTY IN THE EIGHTIES: AN EXAMINATION OF THE MODERN SYSTEM OF CAPITAL PUNISHMENT 5 (1987).

23. *See* B. NAKELL & K. HARDY, THE ARBITRARINESS OF THE DEATH PENALTY 82 (1987) (summarizing pre-*Furman* empirical studies of discrimination in the administration of the death penalty. The studies revealed that; a) in the South, nonwhite defendants are most likely to receive death penalty; b) outside the South, white defendants are more likely to have death sentences imposed on them; and c) defendants convicted of killing whites are more likely to be executed than those convicted of killing nonwhites); Greenberg, *Capital Punishment as a System,* 91 YALE L.J. 908, 910-11 (1982) (noting that virtually all capital defendants are indigent, and that many were sentenced when free legal services were not readily available and automatic appeals of right had not yet been instituted); Wolfgang & Reidel, *Rape, Race, and the Death Penalty in Georgia,* 45 AM. J. ORTHOPSYCHIATRY 658, 666-67 (1975); Wolfgang & Reidel, *Race, Judicial Discretion and the Death Penalty,* 407 ANNALS 126-33 (1973) (strong evidence bias against black defendants convicted of raping white victims).

24. *Furman,* 408 U.S. at 310 (Stewart, J., concurring). Justice Stewart's explanation of the rationale behind *Furman* is perhaps the most recognized. Regarding the "freakish" nature of pre-*Furman* sentences, Stewart stated that the imposition of the death penalty is "cruel and unusual in the same way that being struck by lightning is cruel and unusual." *Id.* at 309.

25. *Id.* at 255-57 (Douglas, J., concurring).

26. The five companion decisions, all announced on July 2, 1976, marked a watershed in the development of capital punishment in America. Although the Court's opinion in each of the cases was delivered only by a plurality (the disposition of each case depended on the votes of Justices Stewart, Powell, and Stevens), the basic principles underlying the decisions remain the foundation of modern death penalty law. The five cases, referred to here as "the 1976 Cases," are: Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); and Gregg v. Georgia, 428 U.S. 153 (1976).

five of the twenty-eight death penalty statutes enacted by state legislatures in response to *Furman*.[27]

Two basic categories of sentencing schemes emerged following *Furman*. Shortly after *Furman*, fourteen states adopted a form of the Model Penal Code, requiring the sentencing authority to weigh aggravating and mitigating circumstances. Statutes of this broad type, sometimes called "guided discretion" statutes, have since been implemented in all but a few of the thirty-seven death penalty jurisdictions.[28] The second type of post-*Furman* statute, adopted in the remaining fourteen states, made the death sentence mandatory for defendants convicted of any one of certain enumerated capital crimes, such as murder of a peace officer or of more than one person, felony murder, or contract murder.[29] The state of Texas adopted an atypical procedure requiring the sentencing jury to answer three questions relating to the degree of deliberation, the defendant's likelihood of future dangerousness, and use of unreasonable force in response to provocation. Each of the questions must be answered in the affirmative for the death sentence to be imposed.

In deciding the companion cases, the Court evaluated the constitutionality of the Georgia and Florida statutes,[30] which followed the "guided discretion" format; the statutes of North Carolina and Louisiana,[31] which followed the mandatory death sentence scheme; and the unique Texas statute.[32] Although no single rationale won a majority of the Court in any of the five cases, a shifting majority of the Court held that the "guided discretion" statutes of Georgia and Florida, and Texas' jury-interrogatory scheme, provided a sufficient level of guidance to promote reliable sentencing and therefore cure the risk of arbitrariness that had plagued earlier statutes.[33] The Court struck down the mandatory

27. *See* Note, *Discretion and the Constitutionality of the New Death Penalty Statutes,* 87 HARV. L. REV. 1690, 1691 n.6 (1974). The five statutes reviewed in the 1976 Cases were FLA. STAT. ANN. § 921.141 (Supp. 1977) (current version at *id.* (West 1985 & Supp. 1989)); GA. CODE ANN. § 27-2534.1 (Supp. 1975) (current version at *id.* (Harrison 1988)); LA. REV. STAT. ANN. § 14:30 (West 1974) (current version at *id.* (West 1986 and Supp. 1989)), amended by LA. CODE CRIM. PROC. ANN. art. 905 (West 1984 and Supp. 1989); N.C. GEN. STAT. §§ 14-17 (Cum. Supp. 1975) (current version at *id.* (Supp. 1988)); and TEX. CRIM. PROC. CODE ANN. § 37.071 (Vernon Supp. 1975-1976) (current version at TEX. CODE CRIM. PROC. ANN. § 37.071 (Vernon 1981 & Supp. 1989)).

28. Geimer & Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases,* 15 AM. J. CRIM. L. 1 (1988). Only Texas and Oregon employ atypical sentencing procedures that depart substantially from the Model Penal Code format. *See* TEX. CRIM. PROC. CODE ANN. § 37.071 (Vernon 1981 & Supp. 1989); OR. REV. STAT. § 163.150 (Supp. 1988).

29. *See* Note, *supra* note 27 at 1710-12.

30. Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976).

31. Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976).

32. Jurek v. Texas, 428 U.S. 262 (1976).

33. *Id.* at 208-77; *Proffitt,* 428 U.S. at 247-60; *Gregg,* 428 U.S. at 196-207.

death penalty statutes, however, insisting that constitutional sentencing required consideration by the sentencer of the individualized circumstances of each defendant and each offense to ensure that the penalty of death is justified.[34]

Despite the fact that these cases revealed a deep division within the Court over the death penalty issue,[35] these two principles—that the jury must consider the individual circumstances involved in each case, and that it must be given adequate guidance to identify and evaluate those factors—have been identified as the touchstones of constitutional capital sentencing procedure.[36]

A. Individualization

The doctrine of individualized sentencing was set out most fully by the Court in *Woodson v. North Carolina.*[37] In its decision invalidating North Carolina's mandatory death statute, the plurality noted that the Court had long recognized the principle that " '[f]or the determination of sentences, justice generally requires the consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender.' "[38]

Until *Woodson*, the practice of individualized sentencing had been instituted merely to reflect enlightened policy; the court raised this practice to a constitutional imperative, stating: "[I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."[39]

In announcing this "individualization" requirement, the Court's main concern was insuring that the sentencer not be precluded from considering factors that could *mitigate* the justification for imposing a capital sentence. The Court has yet to express the parallel interest in insuring the sentencer's consideration of aggravating factors. Rather, the Court

34. *Roberts,* 428 U.S. at 331-36; *Woodson,* 428 U.S. 285-305.

35. Twenty-four separate opinions were filed in the five 1976 Cases. The joint lead opinions filed in each case by Justices Stewart, Powell, and Stevens, however, have been regarded as the source of the Court's capital sentencing guidelines. *See, e.g.,* Zant v. Stephens, 462 U.S. 862, 874-75, 879 (citing plurality opinions); and Lockett v. Ohio, 438 U.S. 586, 602-08 (citing plurality opinion in *Woodson* as source of the principle of unlimited mitigation principle; comparing Ohio death penalty statute to statutes upheld by plurality in 1976 Cases.)

36. *See* Hertz & Weisberg, *In Mitigation of the Penalty of Death:* Lockett v. Ohio *and the Capital Defendant's Right to Presentation of Mitigating Circumstances,* 69 CALIF. L. REV. 317, 320-23 (1981); Liebman & Shephard, *supra* note 7, at 759.

37. 428 U.S. 280, 280 (1976).

38. *Id.* at 304 (quoting Pennsylvania *ex rel.* Sullivan v. Ashe, 302 U.S. 51, 55 (1937)).

39. *Id.* (citing Trop v. Dulles, 356 U.S. 86, 100 (1958) (plurality opinion)).

continues to emphasize that a process according no significance to these individualized factors "excludes from consideration in fixing the ultimate punishment of death the possibility of *compassionate or mitigating factors stemming from the diverse frailties of humankind.*"[40] Such a process would treat defendants not as human beings, but rather as a "faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death."[41] Thus, this type of process could not be consistent with the "respect for humanity" required by the eighth amendment. The Court's rulings established a constitutional right of capital defendants to receive sentencer consideration of mitigating circumstances.[42]

It was not until two years later in *Lockett v. Ohio,*[43] that the Court enunciated the scope of this right. In striking down Ohio's death penalty statute limiting the mitigating factors a jury could consider, the Court established the principles that capital defendants must be allowed to proffer any and all evidence of mitigating factors they wish to put forward and that sentencers must not be precluded from giving "independent mitigating weight"[44] to such evidence.[45] The Court noted that this principle of "unlimited mitigation"[46] is compelled by the constitutional imperative of reliable sentencing.[47] As the Court stated:

> [A] statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth amendments.[48]

Consequently, the eighth and fourteenth amendments require that the sentencer "not be precluded from considering, *as a mitigating factor,* any aspect of the defendant's character or record which may militate in favor of a lesser penalty."[49]

Thus, the *Lockett* requirement that the sentencer consider independently, "as a mitigating factor,"[50] each mitigating factor established by

40. *Id.* (emphasis added). *See,* Hertz & Weisberg, *supra* note 36, at 336-37.

41. *Woodson,* 428 U.S. at 304.

42. *See* Hertz & Weisberg, *supra* note 36, at 323.

43. 438 U.S. 586 (1978).

44. *Id.* at 605.

45. *Id.* at 608.

46. *See* Comment, *Dark Year on Death Row: Guiding Sentencer Discretion After* Zant, Barclay *and* Harris, 17 U.C. DAVIS L. REV. 689, 698 (1984) (authored by R. Wirick).

47. *See* Woodson v. North Carolina, 428 U.S. 280, 304-05 (reliability required because a sentence imposed under unreliable proceedings would be cruel and unusual given the finality of death).

48. *Lockett,* 438 U.S. at 605.

49. *Id.* at 604 (emphasis in original).

50. *Id.*

the defendant, renders any scheme that allows the sentencer to consider mitigating factors on the side of aggravation constitutionally suspect.[51]

B. Guidance

In the 1976 Cases, the Court recognized that the goal of reducing the risk of arbitrariness could not be met merely by directing the jury to consider the particular circumstances of each case. Unguided jury discretion was the precise problem that led to the *Furman* Court's reexamination of arbitrariness in death sentencing. Thus, the Court stated in 1976 that constitutional death penalty statutes also would have to provide for an "informed, focused, guided, and objective inquiry into the question whether [the defendant] should be sentenced to death."[52] The Court insisted that such guidance is not only a hallmark of the American jury system, but is especially necessary when the sentencer's decision involves the ultimate criminal penalty.[53]

Although the Court's language was characteristically vague in the 1976 Cases, the five companion decisions do provide some indication of the nature of the guidance requirement. The 1976 Cases suggest that the guidance requirement has both a substantive and procedural nature. As the Court stated in *Gregg v. Georgia,*[54] the sentencer must be both "apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information."[55]

The substantive aspect of guidance is satisfied by focusing the attention of the jury on those factors that the "State, representing organized society, deems particularly relevant to the sentencing decision."[56] In the Court's view, the "guided discretion" statutes of Florida and Georgia and the interrogatory format of Texas's scheme focused the jury's attention on aggravating and mitigating factors through lists or questions drawn by state legislatures, thereby sufficiently informing the jury of the relevant factors to be considered in its decision.[57]

The Court did not articulate a clear standard relating to the procedural aspect of guidance. The Court's approval of the "weighing" instruction under the Florida and Georgia statutes, and the "yes or no" approach under Texas' law, however, indicates that a low threshold level of procedural guidance will suffice. The requirement appears to be satisfied as long as the jury is given rudimentary instructions regarding how to use the evidence presented. The difficulties presented by complex miti-

51. *See infra* notes 183-96 and accompanying text.
52. Proffitt v. Florida, 428 U.S. 242, 259 (1976).
53. Gregg v. Georgia, 428 U.S. 153, 188, 193 (1976).
54. 428 U.S. 153 (1976).
55. *Id.* at 195.
56. *Id.* at 192.
57. *See* Jurek v. Texas, 428 U.S. 262, 276 (1976); *Proffitt,* 428 U.S. at 251-53; *Gregg,* 428 U.S. at 196-98.

gating factors such as mental illness, retardation, and pathological alcoholism raise the question whether the guidance provided in these and similar statutes meets even the Court's modest threshold.

II. Improper Consideration Examined

American criminal law has long struggled with the relationship between mental disorders and criminal culpability. Although debate continues over incorporation of this relationship into the legal regime, the underlying premise of the debate has remained constant—impaired mental capacity vitiates criminal responsibility and therefore warrants leniency in determining punishment.[58] Because the mitigatory nature of mental disorder may not be self-evident, this section first surveys how Anglo-American penal law historically has dealt with the issue of mental disorder. This examination helps to illuminate the nature of the constitutional and ethical deficiencies of modern death sentencing statutes. The second part of this section then analyzes how the death penalty statutes of three states permit improper consideration of mitigating factors such as mental illness as aggravating factors.

A. Mental Illness as a Mitigating Factor: History and Theory

The American penal system, without exception, has accorded special consideration and leniency to criminals suffering from mental abnormalities.[59] Following British tradition dating back to the medieval period, American colonial courts granted special dispensations to mentally disordered criminal defendants.[60] In 1908, the Supreme Court of Nebraska became the first appellate court in the country to reduce a death sentence to life imprisonment solely because the defendant's physical and mental condition, though not amounting to legal insanity, reduced culpability for the crime.[61] Many other industrialized democracies have general provisions requiring that mental disorder be taken into account as a mitigating factor in all sentencing decisions.[62]

These principles often have been explicitly incorporated into mitigation in contemporary death penalty sentencing. For example, the Model Penal Code includes "extreme mental or emotional disturbance" and

58. *See, e.g.,* MODEL PENAL CODE § 4.02(2) comment (Tent. Draft No. 4, 1955) (impaired mental capacity reduces criminal responsibility).

59. *See* 1 N. WALKER, CRIME AND INSANITY IN ENGLAND 17-27 (1968).

60. E. POWERS, CRIME AND PUNISHMENT IN EARLY MASSACHUSETTS 529 (1966).

61. Hamblin v. State, 81 Neb. 148, 168, 115 N.W. 850, 857 (1908).

62. *See* F. ZIMRING AND G. HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA 4-6 (1986) (every Western European democracy nonetheless has stopped executing criminals through de jure or de facto abolition, or abolition except for specific offenses during wartime); and Liebman & Shephard, *supra* note 7, at 797 nn.171-73 (capital punishment statute of Greece requires consideration of character and level of development).

"mental disease or defect" among its list of mitigating factors in capital cases.[63] At least twenty states include some form of mental disorder specifically as a mitigating factor in their death statutes.[64] The intent behind the inclusion of these factors as mitigating factors is clear. As the Florida Supreme Court said of that state's death penalty law, "a large number of the statutory mitigating factors reflect a legislative determination to mitigate the death penalty in favor of a life sentence for those persons whose responsibility for their violent actions has been substantially diminished as a result of a mental illness, uncontrolled emotional state of mind, or drug abuse."[65]

Two commentators also have argued that a rational and consistent social policy requires treating a broad range of mental disorders as mitigating factors.[66] This study analyzed two types of mental disorder, mental retardation and sociopathy, in light of the dual penological goals of retribution and deterrence that the Supreme Court has used as primary rationales for the death penalty.[67] The study began from the premise that mental disorders should be considered as mitigating factors only when such disorders "reduce[ ] one or both of the penological justifications for the death penalty"[68] identified in the 1976 Cases. Analysis of mental retardation and sociopathy under the Court's penological rationales revealed that both types of disorder reduced the value of either retribution and deterrence or both, and should therefore be viewed as mitigating factors.[69]

Although mental disorders have been explicitly defined in many state statutes as mitigating factors, improper consideration of mental disorders can still occur in a number of ways. For example, even if a statute specifically lists certain factors as "mitigating," the possibility remains that the defendant's mental disorder will be identified as, or linked to, one of the listed aggravating circumstances.[70] Moreover, the disorder

63. MODEL PENAL CODE § 210.6(4)(b) (1980) (extreme mental or emotional disturbance); § 210.6(4)(g) (1980) (mental disease or defect).

64. *See* Liebman & Shephard, *supra* note 7, at 794 n.158.

65. Miller v. State, 373 So. 2d 882, 886 (1979).

66. Liebman & Shephard, *supra* note 7, at 806-36.

67. *See* Gregg v. Georgia, 428 U.S. 153, 182-83 (1976).

68. Liebman & Shephard, *supra* note 7, at 818. The authors note a "striking uniformity of view" among commentators that a mental disorder should mitigate only when it would reduce justifications for the death penalty that have been identified by the Supreme Court. *Id.*

69. *Id.* at 822-34. *But c.f.* Harris v. Pulley, 885 F.2d 1354, 1380-84 (9th Cir. 1988) (jury instruction that could have permitted defendant's sociopathy to be considered in aggravation held valid).

70. The Supreme Court of Florida, for example, has reversed at least two convictions when it found that the trial judge considered the defendant's mental illness as an aggravating factor, Miller v. State, 373 So. 2d 882, 885-86 (1979) (per curiam), or that aggravating circumstances identified by the judge were the "direct consequence" of the defendant's mental illness, Huckaby v. State, 343 So. 2d 29, 33-34 (Fla. 1977), *cert. denied,* 434 U.S. 920 (1977).

may be identified as a nonstatutory aggravating factor, that is, a factor considered by the jury as an aggravating circumstance but not enumerated in the statutory list of aggravating factors.[71] For instance, the jury may find that the defendant's mental illness calls for the imposition of the death penalty because it renders him dangerous and unable to learn from his mistakes.

B. Improper Consideration Under Three Death Penalty Statutes

Despite the unwavering stance of Anglo-American law that certain behavioral disorders require leniency in sentencing, and despite the Supreme Court's sentencing directives, modern death penalty laws nevertheless permit and even condone the misapplication of mitigating factors. Examination of the statutes of California, Texas, and Florida demonstrates this point.[72]

Modern authorities agree that mental illness is a factor that mitigates criminal culpability and therefore militates in favor of leniency in sentencing.[73] Nonetheless, sentencing authorities can and do interpret mental illness as an aggravating factor because of the belief that the defendant's disorder presents a continuing danger to society.[74] Thus, either because a defendant's threat of future dangerousness is identified as an aggravating factor by statute or because it is considered as a nonstatutory aggravating factor, evidence of a defendant's mental illness will weigh on the wrong side of the sentencing scale.

71. Approximately half of the death penalty states specifically preclude jurors from considering aggravating circumstances not listed by statute. Gillers, *supra* note 1, at 101-19. These prohibitions have proven ineffective, however, since a number of these jurisdictions have determined the jury's consideration of nonstatutory aggravating factors to be harmless error as long as at least one listed aggravating factor is found. *See* notes 110-12 and accompanying text.

72. The death penalty laws of each of these states have figured prominently in the genesis of capital sentencing law, for example, both Florida's and Texas' statutes were scrutinized in the 1976 Cases. Moreover, a disproportionate number of capital cases are heard before the courts of these states, with each state carrying a correspondingly disproportionate share of the death sentences imposed or actually carried out. *See* AMNESTY INTERNATIONAL, USA DEATH PENALTY: AMNESTY INTERNATIONAL BRIEFING 20 (1987). The states with the highest number of prisoners on death row as of October 1, 1986, are Florida (247), Texas (218), California (190). Since the California and Florida statutes are also representative of typical sentencing statutes in other states, they illustrate the various ways in which improper consideration typically arises. Texas' statute has been chosen because, as the Supreme Court essentially acknowledged in *Penry,* it exacerbates the difficulties posed by "two-edged" mitigating factors. Penry v. Lynaugh, 109 S. Ct. 2934, 2949 (1989).

73. *See supra* notes 58-71 and accompanying text.

74. *See infra* notes 113-25 and accompanying text.

(1) California

The California sentencing statute highlights this problem. Although the statute lists a variety of factors relating to the defendant and the offense that are to be taken into account in the sentencing decision, it does not identify which factors are intended to be mitigating and which are to be aggravating.[75] The California Supreme Court has consistently rejected the argument that juries could misinterpret the nature of any of the factors listed in the statute. In *People v. Jackson,*[76] the court maintained that the "aggravating or mitigating nature of any of the factors should be self-evident to any reasonable person within the context of a particular case."[77] Since the United States Supreme Court has recognized the potential dual implications of certain mitigating factors, however, it seems clear that the statute actually codifies this ambiguity by failing to distinguish between mitigating and aggravating factors. As a result, the jury is left without guidance to determine whether a factor mitigates or aggravates the defendant's crime.

In *Jackson,* the California Supreme Court rejected the argument that the statute fails to provide adequate guidance to the jury by not distinguishing aggravating factors from mitigating factors.[78] California Supreme Court Chief Justice Rose Bird argued in her dissenting opinion, however, that the mitigating or aggravating nature of several of the listed factors can be subject to differing interpretations by reasonable persons.[79] Chief Justice Bird specifically pointed to the provision regarding mental disorder as an example of a potentially ambiguous factor.[80] This section of the statute asks the sentencer to consider "[w]hether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the affects of intoxication."[81]

According to the plurality, it was "quite obvious that diminished capacity of this type is a mitigating factor."[82] The court cited as support-

75. CAL. PENAL CODE § 190.3 (West 1988).

76. 28 Cal. 3d 264, 618 P.2d 149, 168 Cal. Rptr. 603 (1980) (plurality opinion) (construing 1977 statute), *cert. denied,* 450 U.S. 1035 (1981).

77. *Id.* at 316, 618 P.2d at 176, 168 Cal. Rptr. at 630.

78. *Id.* at 316-17, 618 P.2d at 176-77, 168 Cal. Rptr. at 630-31. The California Supreme Court cited *Jackson* in holding that the 1978 death penalty law, which closely resembles the old law, is also not invalid for its failure to distinguish aggravating factors from mitigating factors. People v. Rodriguez, 42 Cal. 3d 730, 777-79, 726 P.2d 113, 143-44, 230 Cal. Rptr. 667, 697-98 (1986).

79. *Id.* at 353, 618 P.2d at 187, 168 Cal. Rptr. at 641 (Bird, J., dissenting).

80. *Id.,* 618 P.2d at 187, 167 Cal. Rptr. at 641 (Bird, J., dissenting).

81. CAL. PENAL CODE § 190.3(h) (formerly 190.3(g)) (West 1988).

82. *Jackson,* 28 Cal. 3d at 316, 618 P.2d at 176, 168 Cal. Rptr. at 630. In support of its assertion, the plurality noted that this factor is "specifically listed as a mitigating factor by the drafters of the Model Penal Code provision on sentencing standards." *Id.* The court went on

ing authority the Model Penal Code which lists "mental disease or defect" as a mitigating factor.[83] Clearly, the California statute was *intended* to identify "mental disease or defect" as a mitigating factor. As Chief Justice Bird argued, however, without labels or standards to help the jury determine which of the enumerated factors are aggravating circumstances and which are mitigating, "[s]ome sentencing authorities . . . may come to the conclusion that this is a mitigating circumstance" while "[o]thers . . . may consider this a factor favoring execution."[84]

Another factor listed in the statute asks the sentencer to consider "[w]hether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance."[85] In *People v. Poggi,*[86] defendant presented the same argument that, because the statute does not identify this factor as a mitigating circumstance, it "impermissibly authorizes the trier of fact to consider it as a factor in aggravation."[87] Again, the California Supreme Court maintained that "it seems plain that the provision does not authorize the jury to consider the presence of extreme mental or emotional disturbance in aggravation."[88]

The court, however, has expressed concern that prosecutors have taken advantage of the statute's lack of guidance to associate these mitigating factors with aggravating factors in the minds of the jury. In *Poggi*, the court acknowledged that the prosecution "linked defendant's violence and mental illness in a troubling manner"[89] by suggesting that the defendant's mental illness was simply an aggravating factor contributing to his dangerousness. Despite recognizing this problem, the court again rejected the argument that the California statute fails to provide sufficient guidance to help jurors distinguish between mitigating and aggravating factors. Under California law the sentencing authority either may mischaracterize the existence of one of the enumerated factors as an aggravating factor, or may link the defendant's mental illness with a nonstatutory aggravating factor, thereby considering certain factors that should weigh towards mitigation as factors favoring execution.

A further unjust consequence of the statute's lack of guidance is that, depending upon which side of the sentencing equation a jury

to note that the California statute incorporates most of the capital sentencing provisions of the Model Penal Code and that the United States Supreme Court had expressed its approval of these provisions. *See* Gregg v. Georgia, 428 U.S. 153, 193-94 (1976).

83. MODEL PENAL CODE § 210.6(4)(g) (1980).

84. *Jackson,* 28 Cal. 3d at 353, 618 P.2d at 187, 168 Cal. Rptr. at 641 (Bird, J., dissenting).

85. CAL. PENAL CODE § 190.3(d) (West 1988).

86. 45 Cal. 3d 306, 753 P.2d 1082, 246 Cal. Rptr. 886 (1988), *cert. denied,* 109 S. Ct. 3261 (1989).

87. *Id.* at 344, 753 P.2d at 1106, 246 Cal. Rptr. at 910.

88. *Id.* 753 P.2d at 1106, 246 Cal. Rptr. at 910.

89. *Id.* at 345, 753 P.2d at 1106, 246 Cal. Rptr. at 910.

chooses to weigh a defendant's mental illness, "identically situated defendants will be sentenced differently."[90]

(2) Texas

The problem of improper consideration under the Texas statute is subsumed by an even more egregious constitutional defect. Not only does the statute fail to provide the guidance necessary to ensure that juries properly identify certain evidence as mitigatory, but, as the Supreme Court recently recognized in *Penry v. Lynaugh,*[91] it also fails to ensure that the sentencer can give mitigating effect to such evidence.

The Texas statute requires the sentencing jury to answer the following three questions in the affirmative before condemning a capital defendant:

> (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
> (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.[92]

Numerous commentators,[93] and the Fifth Circuit itself,[94] have argued that the statute fails to meet even the basic requirement of *Lockett v. Ohio*[95] that the jury not be precluded from considering "*as a mitigating factor*"[96] any mitigating circumstance proffered by the defendant. Since each of the statutory questions relate only to aggravating circumstances, a jury easily could find that mitigating evidence not directly pertinent to any of the three questions is irrelevant to their task.

90. *Jackson,* 28 Cal. 3d at 353, 618 P.2d at 187, 168 Cal. Rptr. at 641 (Bird, C.J., dissenting)..

91. 109 S. Ct. 2934 (1989).

92. TEX. CRIM. PROC. CODE ANN. § 37.071 (Vernon 1979).

93. *See, e.g.,* Clary, *Voting for Death: Lingering Doubts About the Constitutionality of Texas' Death Capital Sentencing Procedure,* 19 ST. MARY'S L.J. 353, 359-74 (1987); Crump, *Capital Murder: The Issues in Texas,* 14 HOUS. L. REV. 531, 563-81 (1977); Davis, *Texas Capital Sentencing Procedures: The Role of the Jury and the Restraining Hand of the Expert,* 69 J. CRIM. L. & CRIMINOLOGY 300, 300-07 (1978); Dix, *Administration of Texas Death Penalty Statutes: Constitutional Infirmities Related to the Prediction of Dangerousness,* 55 TEX. L. REV. 1343, 1361-77 (1977); Hertz & Weisberg, *supra* note 36, at 339-41; Sicola & Shreves, *Jury Consideration of Mitigating Evidence: A Renewed Challenge to the Constitutionality of the Texas Death Penalty Statute,* 15 AM. J. CRIM. L. 55 (1988).

94. Penry v. Lynaugh, 832 F.2d 915, 920-26 (5th Cir. 1987), *aff'd in part, rev'd in part,* 109 S. Ct. 2934 (1989).

95. 438 U.S. 586 (1978). *See* notes 43-51 and accompanying text.

96. *Id.* at 604.

Nevertheless, the United States Supreme Court, in *Jurek v. Texas,*[97] upheld the statute, insisting that the statute does allow evidence of mitigating factors to come in under the second question regarding future dangerousness.

Yet, even if a jury properly identifies a defendant's mental illness "as a mitigating factor," there is no opportunity under the Texas scheme to give it "independent mitigating weight."[98] If anything, the jury may be constrained to hold that the defendant's mental illness, although reducing culpability, *must* be considered in aggravation because it contributes to his dangerousness. As the Fifth Circuit had stated in its opinion in *Penry,* evidence of the defendant's retardation, arrested emotional development, and troubled youth

> made it more likely, not less likely, that the jury would answer the second question [regarding future dangerousness] yes. It did not allow the jury to consider a major thrust of Penry's evidence as *mitigating* evidence. We do not see how the evidence . . . could, under the instructions and the special issues, be fully acted upon by the jury. There is no place for the jury to say "no" to the death penalty based on principal mitigating force of those circumstances.[99]

In its recent consideration of *Penry,* the Supreme Court grudgingly recognized the Texas statute gives inadequate guidance regarding independent mitigating weight. The Court limited the effect of its admission, however, by stating that only *"[i]n this case"* did the Texas statute fail to provide a vehicle for the jury to "consider and give effect to the mitigating evidence."[100]

Constrained by its opinion in *Jurek,* and limited by the pleadings that left unchallenged the facial validity of the Texas statute, the *Penry* Court did not address the constitutionality of Texas' capital scheme as a whole.[101] The Court acknowledged, however, that, as applied in the circumstances of Penry's case, the Texas statute was constitutionally inadequate. Confirming the analysis of prior critics of the statute, the Court observed that the evidence presented by Penry regarding his mental retardation and abusive childhood is relevant to the second "special issue" regarding future dangerousness "only as an *aggravating* factor because it

97. 428 U.S. 262 (1976).

98. 438 U.S. at 605.

99. *Penry,* 832 F.2d at 925 (emphasis in original). The Fifth Circuit strongly criticized the Texas statute, asking rhetorically: "How can a jury act on its 'discretion to consider relevant evidence that might cause it to *decline to impose* the death penalty?' . . . Where, in the Texas scheme is the 'moral inquiry' of the 'individualized assessment of the appropriateness of the death penalty?' " *Id.* (quoting McClesky v. Kemp, 481 U.S. 279, 304 (1987) and California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)).

100. *Penry,* 109 S. Ct. at 2952 (emphasis added).

101. *Id.* at 2945 ("Penry does not challenge the facial validity of the Texas death penalty statute, which was upheld against an Eighth Amendment challenge in *Jurek v. Texas.*").

suggests a yes answer to the question of future dangerousness."[102] Consequently, the Court concluded, it would be necessary to supplement the statute with instructions "informing the jury that it could consider and give effect to the mitigating evidence of Penry's mental retardation and abused background by declining to impose the death penalty."[103]

Whether the Court's solution will in practice cure the flaws in the Texas statute is not clear. In essence, the Court is requiring that on remand the *Penry* jury be provided with instructions that will permit it to avoid the conclusions compelled by the statute. If Penry's mental retardation and legacy of childhood abuse do in fact render him likely to "commit criminal acts of violence that would constitute a continuing threat to society,"[104] the statute compels a "yes" answer to the second special issue. Thus, as Justice Scalia argued in dissent, under the majority's analysis "the [statute's] constitutionality turns on whether the questions allow mitigating factors not only to be considered (and, of course, given effect in answering the questions), *but also to be given effect in all possible ways, including ways that the questions do not permit.*"[105] The effect of the Court's holding is that the Texas death penalty statute, as applied in Penry's case, is constitutional only if the jury is informed that it may nullify the conclusion the statute itself mandates. A sounder holding might require instead that the assurances of proper consideration of mitigating circumstances be incorporated into the statutory scheme itself rather than superimposing such assurances in opposition to the statute.

Despite these flaws, *Penry* is important because it recognizes that the ambiguous nature of certain mitigating evidence requires that juries be provided close guidance to ensure that such evidence is considered and given effect "as mitigating evidence."

(3) Florida

Though the Florida statute[106] reduces the possibility that juries will improperly consider truly mitigating factors as aggravating circumstances, several cases reveal that the problem remains.[107]

102. *Id.* at 2949.

103. *Id.* at 2952. The Court also held that the first question of the statute regarding deliberation failed to ensure that juries would give effect to the mitigating evidence presented by the defendant. The Court required that instructions be provided to the jury on remand defining the word "deliberately" "in a way that would clearly direct the jury to consider fully Penry's mitigating evidence as it bears on his personal culpability." *Id.* at 2949. Only then could it be assured that "the jury [is] able to give effect to the mitigating evidence of Penry's mental retardation and history of abuse in answering the first special issue." *Id.*

104. TEX. CRIM. PROC. CODE ANN. § 37.071(b)(2) (Vernon 1979).

105. *Id.* at 2966 (emphasis in original) (Scalia, J., dissenting).

106. FLA. STAT. ANN. § 921.141 (West 1985 & Supp. 1989).

107. *See* Miller v. State, 373 So. 2d 882 (Fla. 1979); Huckaby v. State, 343 So. 2d 29 (Fla.), *cert. denied,* 434 U.S. 920 (1977). Note that the jury plays only an advisory role in capital

Unlike the California statute, which does not label the enumerated circumstances as either "aggravating" or "mitigating," the Florida law contains separate sections for the two types of factors.[108] The labeling of mitigating factors, particularly factors relating to mental illness or disturbance, diminishes the possibility that the jury will improperly identify such factors as aggravating. Nonetheless, the statute lists only extreme forms of mental disturbance or impairment,[109] leaving the possibility that lesser forms of mental disorder will not be given "independent weight" as mitigating factors.

The Florida law also limits consideration of aggravating circumstances to the eleven enumerated in the statute, in contrast to other state statutes that expressly permit consideration of aggravating factors not enumerated in the statute.[110] This aspect of the Florida law substantially limits the possibility that the jury will consider aggravating factors other than those listed in the statute.[111] The Florida Supreme Court, however, has undermined this precaution by applying the "harmless error" rule in circumstances when the sentencer considers nonstatutory aggravating factors in violation of the statute's prohibition. The court has held such error to be harmless as long as it believes "the result of the [trial judge's] weighing process would not have been different had the impermissible factor not been present."[112] Consequently, despite the precautions writ-

sentencing under the Florida scheme. Pursuant to § 921.141(3), the judge retains ultimate authority to follow or disregard the recommendation of the jury."

108. FLA. STAT. ANN. § 921.141(5) (aggravating); § 921.141(6) (mitigating) (West 1985 & Supp. 1989).

109. Section 921.141(6) includes among its list of seven mitigating circumstances that:

"(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

. . . .

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired."

110. FLA. STAT. ANN. § 921.141(5) (West Supp. 1989), titled "Aggravating Circumstances," states that "[a]ggravating circumstances shall be limited to the following: . . . ."

111. There always remains the possibility that the jury will, either deliberately or unintentionally, allow extraneous factors to enter into the decision, despite strict guidance. Jurors may introduce improper factors into the deliberations as nonstatutory aggravating factors, or may give undue weight to an enumerated factor out of discriminatory or arbitrary motives. *See* Geimer & Amsterdam, *supra* note 28, at 6-7, 23-53 (survey of jurors' reasons for voting for or against capital punishment suggests "quite strongly that there is no way to guide the discretion of juries." *Id.*)

112. Jackson v. Wainwright, 421 So. 2d 1385 (1982), *cert. denied,* 463 U.S. 1229 (1983). The Florida Supreme Court originally ruled that the use of nonstatutory aggravating factors was acceptable if no mitigating circumstances are found, and some statutory aggravating circumstances exist to support the death sentence. Elledge v. State, 346 So. 2d 998, 1002-03 (1977), *cert. denied,* 459 U.S. 981 (1982). As the court stated, "The absence of mitigating circumstances becomes important, because, so long as there are *some* statutory aggravating circumstances, there is no danger that nonstatutory circumstances have served to overcome the mitigating circumstances in the weighing process which is dictated by our statute." *Id.* at

ten into Florida's death penalty statute, judges and juries may nevertheless link truly mitigatory evidence to enumerated aggravating factors, or consider extraneous aggravating factors despite clear instructions to consider only those listed in the statute.

One Florida case reveals how mental and emotional impairment may be linked to, or misidentified as, factors specifically listed by the statute as "aggravating." In *Huckaby v. State,* the trial judge found the existence of two statutory aggravating factors:[113] that the defendant had "knowingly created a great risk of death to many persons,"[114] and that the crime was "especially heinous, atrocious or cruel."[115] Despite "almost total agreement" among the medical experts on the defendant's mental illness and its controlling influence on him"[116] the trial judge found no mitigating circumstances in the case and thus imposed a death sentence.

The Florida Supreme Court vacated the defendant's death sentence, however, based on its finding that the statutory aggravating factors identified by the trial judge were the "direct consequence of defendant's mental illness."[117] Yet, the court did not rule that the trial judge's findings regarding the two tainted aggravating factors constituted error. Rather the court took the unusual step of ruling, sua sponte, that the evidence of the defendant's mental illness showed the existence of two statutory *mitigating* circumstances, and that these mitigating circumstances outweighed the aggravating circumstances in the case.[118]

1003 (citations omitted). Despite this proscription, however, the court has since ruled that even where mitigating circumstances are found to exist, the use of nonstatutory aggravating circumstances may be harmless error. The judgment will stand if "the result of [the trial judge's] weighing process would not have been different had the impermissible factor not been present." *Id.* at 1388; *see also* Jacobs v. State, 396 So. 2d 1113, *cert. denied,* 454 U.S. 933 (1981) (distinguishing *Elledge*).

113. Huckabay v. State, 343 So. 2d 29, *cert. denied,* 434 U.S. 920 (1977). The trial judge also found a third aggravating circumstance based upon his determination that the defendant had a propensity to commit rape and therefore constituted "a danger and menace to society." *Id.* at 33 & n.11. On review, the Florida Supreme Court rejected this third factor as an improper nonstatutory aggravating factor. Id. The court's decision, however, predated the court's establishment of the harmless error rule in Elledge v. State, 346 So. 2d 998 (1977) (discussed at *supra* note 112).

114. FLA. STAT. ANN. § 921.141(5)(c).

115. *Id.* at § 921.141(5)(h).

116. *Huckaby,* 343 So. 2d at 33.

117. *Id.* at 34.

118. Normally, a death sentence will be vacated and the case remanded for resentencing upon a finding of error in the original sentencing proceeding. *See, e.g.,* Miller v. State, 373 So. 2d 882, 886 (1979); Elledge v. State, 346 So. 2d 998, 1004 (1977), *cert. denied,* 459 U.S. 981 (1982). As the Florida Supreme Court stated: "It is not the function of this court to cull through what has been listed as aggravating and mitigating circumstances in the trial court's order, determine which are proper for consideration and which are not, and then impose the proper sentence. In accordance with the statute, the culling process must be done by the trial court." Mikenas v. State, 367 So. 606, 610 (1978), *appeal after remand,* 407 So. 2d 606 (1978),

Huckaby and another Florida case, *Miller v. State,*[119] reveal how mental illness also may be used or identified as a *nonstatutory* aggravating factor under the Florida scheme. In each case, the trial judge allowed the defendant's mental disorder to be used as a factor in aggravation because it led to a propensity to commit future violent acts.[120] In *Miller,* the trial judge noted in his sentencing order that testimony established that the defendant would never recover from his dangerous mental sickness or illness. Consequently, because of "the reality of Florida law wherein life imprisonment is not, in fact, life imprisonment,"[121] the trial judge concluded that "the only assurance society can receive that this man never again commits to another human being what he did to that lady, is that the ultimate sentence of death be imposed."[122]

The Florida Supreme Court found that it was "clear from the trial judge's sentencing order that he considered as an aggravating factor the defendant's allegedly incurable and dangerous mental illness."[123] As the court noted, "the trial judge's use of the defendant's mental illness, and his resulting propensity to commit violent acts as an aggravating factor" was not only technically improper because it was used as a nonstatutory aggravating factor "tipping the balance in favor of the death penalty," but was also contrary to the clear intent of the Florida legislature.[124] As the court stated,

> The legislature has not authorized consideration of the probability of recurring violent acts by the defendant if he is released on parole in the distant future. To the contrary, a large number of the statutory mitigating factors reflect a legislative determination to mitigate the death penalty in favor of a life sentence for those persons whose responsibility for their violent actions has been substantially diminished as a result of a mental illness, uncontrolled emotional state of mind, or drug abuse.[125]

The foregoing illustrates how mitigating factors such as mental illness may be improperly considered under three states' death penalty statutes as aggravating factors. Some courts, identifying instances of such misapplication of mitigating evidence, or situations in which improper consideration could occur, have taken steps to remedy the problem in those individual cases. This occurred in the United States Supreme

cert. denied, 456 U.S. 1011 (1972). Florida law, nonetheless, permits courts to correct illegal sentences without a resentencing hearing. Anderson v. State, 267 So. 2d 8, 10 (1971).

119. 373 So. 2d 882 (1979).

120. *Id.* at 885-86; *Huckaby,* 343 So. 2d at 33 & n.11.

121. 373 So. 2d at 885.

122. *Id.*

123. *Id.*

124. *Id.* at 885-86. The use of the nonstatutory aggravating factor was not harmless error under Elledge v. State, 346 So. 2d 998 (1977), *cert denied,* 459 U.S. 981 (1982), because the trial court also found the existence of three mitigating circumstances.

125. *Miller,* 373 So. 2d at 886.

Court's recent decision in *Penry*, and in the Florida Supreme Court's *Miller* decision.

In many cases, however, it may be impossible for a reviewing court to discern that mitigating evidence has been misapplied. Incomplete jury findings, or statutes that permit minimal jury findings regarding the aggravating circumstances relied upon to impose death, may render unreviewable many instances of improper consideration. *Furman* and its progeny suggest that death sentencing statutes must provide better guidance to the sentencing authority in capital cases to prevent the possibility of mitigating factors being used to support death judgments.

III. The Case Against Improper Consideration

The United States Supreme Court, in *Zant v. Stephens*,[126] provided solid footing for a challenge to the validity of modern capital punishment schemes when it announced that mislabeling mitigating factors can violate due process. In large part the failure of death penalty statutes to effectuate the fundamental policies set forth in *Furman* and the cases following it constitutes their overriding deficiency.

Immediately following the 1976 Cases, only a few justices and scholars argued that modern death schemes fail to provide for the guidance and individualization that *Furman* and its progeny require.[127] This view has since gained acceptance. At least one federal circuit court has felt constrained by precedent to uphold the constitutionality of a state statute, despite expression of serious doubts about the statute's validity.[128] Most states have strained to salvage sentencing schemes by requiring supplemental jury instructions to increase the level of guidance provided in the deficient statute.[129] These instructions typically require judges to

126. 462 U.S. 862 (1983).

127. *See, e.g.*, Jackson v. State, 337 So. 2d 1242, 1260-62 (Miss. 1976) (Inzer, J., dissenting); People v. Jackson, 28 Cal. 3d 264, 339-65, 618 P. 2d 149, 178-95, 168 Cal. Rptr. 603, 632-49 (1980) (Bird, C.J., dissenting), *cert. denied*, 450 U.S. 1035 (1981); *see also* Liebman & Shephard, *supra* note 7, at 836 (underlying justifications for death penalty must be "ensconced in legal procedures with varying degrees of dispatch").

128. The Fifth Circuit noted throughout its opinion in *Penry* that the Supreme Court had validated the Texas statute in *Jurek*. Penry v. Lynaugh, 832 F.2d 915, 920-26 (1987). As the Fifth Circuit observed:

> Developing Supreme Court law, however, recognizes a constitutional right that the jury have some discretion to decline to impose the death penalty. There is a question whether the Texas scheme permits the full range of discretion which the Supreme Court may require. Perhaps, it is time to reconsider *Jurek* in light of that developing law.

Id. at 925 (footnotes omitted).

129. *See* Bell v. Watkins, 692 F.2d 999, 1011-12 (5th Cir. 1982) (requiring instructions defining aggravating and mitigating circumstances because Mississippi statute fails to provide such guidance), *cert. denied*, 464 U.S. 843 (1983); Jordan v. Thigpen, 688 F.2d 395, 397 (5th Cir. 1982) (instructions required in Mississippi stating that consideration of aggravating cir-

inform jurors of the nature and function of mitigating circumstances, and are often called "focusing instructions." There are several compelling reasons, however, why such "hole plugging" remedies do not satisfy the requirements of a constitutional death penalty. First, there is no indication that focusing instructions, although required by the Fifth and Eleventh Circuits, are mandated by state or federal appellate courts in other jurisdictions. If anything, most courts appear to resist tampering with the guidance provided in capital penalty statutes.[130] The death penalty, however, must meet constitutional standards in *all* jurisdictions.

Second, one might argue that courts are usurping legislative authority when they impose additional jury instruction requirements to shore up the inadequate guidance provided in the statutes. Because these instructions are imposed to cure constitutional deficiencies, they are material changes to the law that should be made by legislative, rather than judicial bodies.[131]

Finally, if modern capital punishment schemes fail to provide a constitutionally sufficient level of guidance, it is the responsibility of the Supreme Court to establish minimum constitutional standards for the states to follow to cure systemic violations of constitutional safeguards. The maintenance of constitutional rights should not depend upon the grace of appellate tribunals and piecemeal case-by-case remedies.

Moreover, the Supreme Court's reluctance to reexamine the constitutionality of the "guided discretion" statutes of the type it approved in 1976,[132] should not be grounds for blind acceptance of these decisions as immutable proclamations on the law of capital sentencing. The courts, and the Supreme Court in particular, currently display "a marked aver-

cumstances is limited to those in statute), *cert. denied,* 109 S. Ct. 57 (1988); Goodwin v. Balkcom, 684 F.2d 794, 801-02 (11th Cir. 1982) (instructions required in Georgia which "clearly guide a jury in its understanding of mitigating circumstances and their purpose"), *cert. denied,* 460 U.S. 1098 (1983); Spivey v. Zant, 661 F.2d 464, 470 (5th Cir. 1981) (instructions about mitigating circumstances required in Georgia), *cert. denied,* 458 U.S. 1111 (1982); *see also* Jackson v. State, 337 So. 2d 1242 (Miss. 1976) (construing Mississippi death penalty statute as constitutional under 1976 Cases).

130. *See, e.g.,* People v. Jackson, 28 Cal. 3d 264, 316, 618 P.2d 149, 176, 168 Cal. Rptr. 603, 630 (declining to require labeling of factors in California death statute).

131. *See, e.g.,* Jackson v. State, 337 So. 2d 1242, 1260 (Miss. 1976) (Inzer, J., dissenting): "[T]his Court has the authority . . . to say that the punishment prescribed by the legislature under our capital murder statute constitutes cruel and inhuman punishment, but we do not have the authority to prescribe incidents and conditions necessary to make the statute constitutional. That function belongs entirely to the legislature." The plurality in Gregg v. Georgia, 428 U.S. 153 (1976), contemplated that sentencing procedure would be determined by state legislatures, rather than by courts forced to prescribe conditions necessary to maintain constitutional safeguards. As the Court stated, "No longer can a jury wantonly and freakishly impose the death sentence; it is always circumscribed by legislative guidelines." *Id.* at 206-07.

132. The Court's granting of certiorari in *Penry* to reexamine whether the Texas statute approved in *Jurek* allows for a sufficient degree of discretion with respect to mitigating factors perhaps indicates the Court's willingness to reconsider the 1976 Cases.

sion to information about how the death penalty works in practice . . . because the operational evidence continues to contradict the rosy future the Court predicted for capital schemes."[133] As the rising voices in the lower courts reach an uproar, the Court may be forced to take another look at these statutes.

In brief, modern death penalty schemes are constitutionally deficient in four respects. First, they fail to guide the jury adequately in identifying and understanding the application of mitigating factors, contrary to the dictates of *Furman v. Georgia.*[134] Second, they permit and even condone the introduction of improper aggravating circumstances into the sentencing equation in contravention of the Court's announcement in *Zant v. Stephens*[135] Third, they condone the use of nonstatutory aggravating factors, opening the door for the arbitrariness and discrimination that the Court in *Furman* and its progeny tried to prevent. Finally, they violate *Lockett v. Ohio*[136] by raising the substantial possibility that ambiguous mitigating factors will be viewed as aggravating factors and therefore not be accorded independent mitigating weight.

A. Insufficient Guidelines

In *Gregg v. Georgia,*[137] the first of the five 1976 Cases, the Court emphasized that "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."[138] The preeminent shortcoming of modern death penalty statutes is their failure to provide such guidance.

In 1971, in *McGautha v. California,*[139] Justice Harlan argued that the factors that should guide a sentencer in determining whether a life should be taken or spared are too complex to be reduced to a tidy formula, and thus warned that sentencing guidelines can probably be no more than "meaningless 'boilerplate.' "[140] The Supreme Court rejected Justice Harlan's view in the 1976 Cases by insisting that proper sentencing guidelines could adequately prevent the arbitrary and capricious imposition of death sentences. Examining these statutes in light of the peculiar problems posed by mitigating factors such as mental disorder, however, reveals that they have yet to address adequately Justice Harlan's concerns.

133. Geimer & Amsterdam, *supra* note 28, at 4.
134. 408 U.S. 238 (1972). *See* text accompanying notes 21-27.
135. 462 U.S. 862 (1983). *See* text accompanying notes 12-15.
136. 438 U.S. 986 (1978). *See* text accompanying notes 43-51.
137. 428 U.S. 153 (1976).
138. *Id.* at 189.
139. 402 U.S. 183 (1971).
140. *Id.* at 208.

The ability of judges and juries to mischaracterize as aggravating certain factors that the Supreme Court has insisted may only be considered as mitigating illustrates that sentencing authorities are not receiving sufficient guidance. The *Gregg* requirement that juries receive guidance regarding relevant factors seems to mandate clear instruction as to either the proper mitigating or aggravating circumstances so that evidence is not weighed by the sentencer in a way the legislature did not intend,[141] or instruction regarding the primary societal goals of capital punishment so that the sentencing authority may make an informed determination whether particular evidence should be viewed as mitigating or aggravating.[142] Merely listing the circumstances to be considered has not provided enough guidance to sentencing authorities. As a result, the constitutional rights of capital defendants' are violated when juries mischaracterize truly mitigating evidence.

As Florida's death penalty sentencing statute illustrates, however, simply labeling mitigating and aggravating factors may cure only some of the problems associated with ambiguous mitigating factors. Under *Lockett,* the jury must not be precluded from giving "independent weight" to *any* mitigating evidence proffered by the defendant. Thus, even if the sentencing authority is not improperly identifying mitigating circumstances as aggravating, a substantial possibility remains that the jury will fail to give effect to mitigating evidence because it fails to recognize it as mitigatory.

As indicated above, a number of courts have recognized the necessity of defining mitigating and aggravating circumstances for the jury in

141. This view has been adopted at least by the Fifth and Eleventh Circuits, and argued by dissenting justices in several states. *See supra* note 129 and accompanying text.

142. In the 1976 Cases, the Court indicated that capital sentencing procedures must be linked to the underlying substantive requirements of the eighth amendment. As the Court stated in *Gregg,* to avoid constitutional strictures a penalty must "accord with 'the dignity of man,' " which the Court stated is "the 'basic concept underlying the eighth amendment.' " *Gregg,* 428 U.S. at 173 (quoting Trop v. Dulles, 356 U.S. 86, 100 (1958) (plurality opinion)). Practically, the Court explained, this standard requires that the punishment not be excessive, which in turn means that it must not unnecessarily inflict pain or be disproportionate to the severity of the crime. *Id.* To ensure that pain is not inflicted gratuitously, the Court continued, the sanction must contain some recognized penological justification. *Id.* at 182-83.

Justice Bird in *Jackson* argued that statutes clearly identifying the factors that are aggravating and those that are not, and requiring written findings of at least one statutory aggravating circumstance, sufficiently ensure that death sentences accrued with a state's primary penological justifications for utilizing the death penalty. 28 Cal. 3d 352-54, 618 P.2d 186-88, 168 Cal. Rptr. 640-42.

Justice Brennan, however, has argued that the death penalty should require actual instructions regarding penological justification. McGautha v. California, 402 U.S. 183, 283-87 (1971) (Brennan, J., dissenting). This view has been espoused by at least several commentators. *See* Hertz & Weisberg, *supra* note 36, at 367-73; Liebman & Shephard, *supra* note 7, at 785-86; Comment, *supra* note 46, at 711-12, n.117.

order to ensure that the evidence is given proper consideration.[143] Although it may appear that the aggravating or mitigating nature of various factors introduced into evidence during a sentencing hearing would be "self-evident to any reasonable person,"[144] the heightened concern for reliability and fairness in capital sentencing[145] requires such precautionary instructions.[146]

B. Improper Aggravating Circumstances

Although numerous judges and scholars recognize the problem of ambiguous mitigating factors, the significance of the Supreme Court's announcement in *Zant v. Stephens*[147] that due process would be violated if a state "attached the 'aggravating' label to factors . . . that actually should militate in favor of a lesser penalty such as perhaps a defendant's mental illness"[148] has yet to be appreciated. This failure may be explained by the fact that the statement is made in *dictum* and is not further elaborated. Moreover, the Court introduced its supporting authority for the statement with the "*cf.* " signal, suggesting that the case

143. *See supra* note 129 and accompanying text. In Spivey v. Zant, 661 F.2d 464, 471 (5th Cir. 1981), *cert. denied,* 458 U.S. 111 (1982), the court stated that the "guidance" requirement of the 1976 Cases required judges to "clearly and explicitly *instruct the jury about mitigating circumstances* and the option to recommend against death; in order to do so, the judge will normally tell the jury *what a mitigating circumstance is* and what its function is in the jury's sentencing deliberations." *Id.* at 471 (footnote omitted) (emphasis added).

144. *Jackson,* 28 Cal. 3d at 316, 618 P.2d at 176, 168 Cal. Rptr. at 630.

145. In Morrissey v. Brewer, 408 U.S. 471 (1972), decided the same day as *Furman,* the Court stated: "It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands." *Id.* at 481. The Court has therefore imposed unique procedural requirements where society's ultimate criminal sanction, the death penalty, is involved. *See supra* notes 21-57 and accompanying text. As the Court stated in Ford v. Wainwright, 477 U.S. 399, 411 (1986) (plurality opinion), "In capital proceedings generally, this Court has demanded that factfinding procedures aspire to a heightened standard of reliability. . . . This especial concern is a natural consequence of the knowledge that execution is the most irremedial and unfathomable of penalties; that death is different." (citations omitted).

146. *See* Comment, *supra* note 46, at 711 n.117. See also Gregg v. Georgia, 428 U.S. 153, 192, in which the Court insisted:

> the provision of relevant information under fair procedural rules is not alone sufficient to guarantee that the information will be properly used in the imposition of punishment, *especially if sentencing is to be performed by a jury.* Since the members of a jury will have had little, if any, previous experience in sentencing, they are unlikely to be skilled in dealing with the information they are given (emphasis added).

The Court then stated that the problem could be alleviated by giving the jury "guidance" regarding the factors to be taken into account in the sentencing determination. *Id.*

147. 462 U.S. 862 (1983).

148. *Id.* at 885.

it was citing, *Miller v. State,*[149] stands only for an analogous proposition.[150]

The Court's reference to *Miller,* however, is highly significant. In that case, the Florida Supreme Court held that the sentencer's consideration of the defendant's mental illness as a nonstatutory aggravating factor was improper.[151] Though the Court's discussion in *Stephens* noted only that the *state* may not mislabel mitigating factors,[152] the Court's reference to *Miller* suggests that it also would consider the mislabeling of mitigating factors by the *sentencing authority,* as occurred in *Miller,* an equally apparent violation of due process.

The lack of guidance given to juries in understanding mitigating and aggravating circumstances leaves open the possibility that certain mitigating factors will either be linked to, or be considered independently as, aggravating factors. Because *Stephens* suggests that this lack constitutes a violation due process, the failure of modern death penalty statutes to provide constitutionally sufficient guidance becomes evident.

The problem reaches further. A number of states do not require the sentencer to reveal the aggravating circumstances relied upon to support a death verdict, or only require the sentencer to make an explicit finding as to the existence of *one* listed aggravating factor.[153] Consequently, in these states there may be no way to determine in these states whether the decision to execute was supported by improper aggravating factors.

149. 373 So. 3d 882 (Fla. 1989).

150. *Id.* The Court cited Miller v. State, 373 So. 2d 882 (Fla. 1979) in which the Florida Supreme Court found that the trial judge had considered defendant's mental illness as a nonstatutory aggravating factor. *Id.* at 885-86. The Florida court held that the trial judge's finding on this issue was reversible error. *See supra* notes 119-25 and accompanying text.

151. *Id.* at 885. One should note that the fact that the Florida statute purports to limit consideration of aggravating factors to those listed in the statute does not render the Court's affirmation of the *Miller* holding inapplicable to those states that *do* allow consideration of nonstatutory aggravating factors. The *Zant* Court's citation to *Miller* is not based on the aspect of the holding relating to the impermissibility of a Florida trial court considering nonstatutory aggravating factors. Rather, the citation notes the impropriety of considering mitigating factors on the side of aggravation. Regardless, the Court in Barclay v. Florida, 463 U.S. 939 (1983) (plurality opinion), decided the same summer as *Zant,* held that consideration of nonstatutory aggravating circumstances under the Florida statute is harmless error so long as the improper factor is not one which would be constitutionally impermissible to consider in aggravation. *Id.* at 984-88. The holding in *Barclay* thus negates any distinction between the Florida statute, which purports to limit sentencer consideration of mitigating factors to those listed in the statute, and those statutes explicitly allowing consideration of nonstatutory aggravating factors.

152. The Court makes the statement in the middle of a discussion regarding what the State of Georgia could not have permissibly included in its instructions to a capital jury. *Stephens,* 462 U.S. at 885.

153. *See, e.g.,* CAL. PENAL CODE § 190.3 (West 1988); People v. Rodriguez, 42 Cal. 3d 730, 777-79, 726 P.2d 113, 143-44, 230 Cal. Rptr. 667, 697-98 (1986) (written findings by jury as to the aggravating factors supporting a death judgment not required).

The Supreme Court clearly established in *Stephens* that the consideration of mitigating factors such as mental illness in aggravation may violate due process.[154] Consequently, modern capital sentencing schemes, by condoning improper consideration and often providing no opportunity for meaningful appellate scrutiny of the death penalty decision, allow violations of fundamental constitutional rights to go undetected. Particularly in a matter "so grave as the determination of whether a human life should be taken or spared,"[155] the law cannot tolerate such a situation.

C. Nonstatutory Aggravating Factors

Current death penalty statutes may also violate the constitutional requirement of adequate sentencer guidance by failing to limit consideration of nonstatutory aggravating factors.[156] The United States Supreme Court, in *Zant v. Stephens,* concluded that death penalty schemes need not preclude consideration of nonstatutory aggravating factors.[157] The Court cautioned, however, that the sentencer may not rely on aggravating factors that are "constitutionally impermissible or totally irrelevant to the sentencing process."[158] The Court's directive against consideration of impermissable factors fails to adequately protect constitutional guarantees. Despite the Court's proscription, impermissible aggravating factors may still influence a jury's determination to impose a death sentence without the possibility of meaningful judicial review. In states that do not require complete findings by the sentencing authority of factors relied on to support a death verdict, the use of improper nonstatutory factors may go undetected. Even where such findings are required, improper factors may "color" the sentencer's weighing process, though unreported as distinct factors relied upon by the jury. It thus appears that limitations on the consideration of improper nonstatutory aggravating factors must be made clear to the sentencer *before* the sentencing decision takes place if death penalty statutes are to comport with the requirements of constitutional sentencing.

The Supreme Court's motivation in restructuring the American death penalty system in *Furman* and *Gregg* was to minimize the risk, if not the reality, of arbitrary and discriminatory imposition of capital pun-

154. *Stephens,* 462 U.S. at 885.

155. Gregg v. Georgia, 428 U.S. 153, 189 (1976).

156. Approximately fifteen death penalty states expressly permit consideration of nonstatutory aggravating factors. *See* Gillers, *supra* note 1, at 101-19 (appendix). Even in jurisdictions whose statutes prohibit consideration of nonstatutory aggravating factors, the jury may nevertheless be permitted to rely on such factors through application of the harmless error rule. *See supra* note 112 and accompanying text.

157. Zant v. Stephens, 462 U.S. 862, 878-89 (1983).

158. *Id.* at 885.

ishment.[159] Under a majority of current statutes, the sentencing determination is made through a process of weighing aggravating and mitigating circumstances.[160] Consequently, the decision to impose the death penalty lies with the sentencer's consideration of *aggravating* circumstances. Because the sentencing authority retains, under *Stephens*, discretion to determine what to weigh as an aggravating factor, the sentencer has virtually the same unfettered discretion to decide whether to impose the death penalty as it did prior to *Furman*.

The Fifth Circuit asserted this view in *Henry v. Wainwright*,[161] in which the court reproved the Florida practice of permitting jurors to consider nonstatutory aggravating factors despite its statute limiting consideration of aggravating factors to those specifically enumerated by statute.[162] In the court's view, this practice not only violated state law, but the Constitution as well. The court reasoned that permitting the consideration of nonstatutory aggravating factors violated *Furman* by allowing judges and juries overly broad sentencing discretion.[163] A reliable capital sentencing scheme must provide a "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not."[164] As the *Henry* court argued:

> We believe that permitting the jury to consider whatever evidence of nonstatutory aggravating circumstances the prosecution might desire to present or the jurors might discern in the testimony opens too wide a door for the influence of arbitrary factors on the sentencing determination. By sanctioning consideration of statutory aggravating factors *plus anything else the jury determines to be aggravating*, such an instruction broadens jury discretion rather than channels it and obscures any meaningful basis for distinguishing cases in which the death penalty is imposed from those in which it is not.[165]

The Supreme Court's conclusion in *Stephens* permitting consideration of nonstatutory aggravating factors rejects the Fifth Circuit's analy-

159. *See Gregg*, 428 U.S. at 189 (sentencer's "discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.").

160. *See* Sicola & Shreves, *supra* note 93, at 64-65, 65 n.61 (thirty-five of thirty-seven death penalty states provide for some sort of balancing of mitigating and aggravating circumstances under the general format of the Model Penal Code).

161. 661 F.2d 56 (5th Cir. 1981), *vacated mem.*, 457 U.S. 1114 (1982).

162. *Id.* at 58-59. The Florida courts had interpreted two footnotes in Proffit v. Florida, 428 U.S. 242, 250 n.8, 256 n.14 (1976), to permit death sentences only partially predicated on nonstatutory aggravating factors.

163. *Henry*, 661 F.2d at 58-59.

164. *Furman*, 408 U.S. at 313 (White, J., concurring).

165. *Henry*, 661 F.2d at 59 (emphasis in original). The Ninth Circuit, however, in Harris v. Pulley, 692 F.2d 1189 (9th Cir. 1982), *rev'd on other grounds*, 465 U.S. 37 (1984), specifically repudiated the Fifth Circuit's holding in *Henry* that consideration of nonstatutory aggravating factors is constitutionally impermissible. *Id.* at 1194. The Court held that the California statute's requirement that the jury be instructed to consider the factors listed in the statute provided sufficient guidance in light of the requirements of *Furman*, *Gregg*, and *Lockett*. *Id.*

sis. The *Stephens* Court's reasoning may be questioned, however, as contrary to the principles established in the Court's earlier death penalty decisions. First, the Court's conclusion rests upon a controversial analysis of the implications of *Gregg v. Georgia.* The Georgia statute upheld in *Gregg* required that the jury find at least one statutory aggravating circumstance before a defendant is eligible for the death penalty. Once that determination is made, however, the jury is provided no direction as to how to weigh the aggravating and mitigating circumstances in the case to determine if the defendant, already found to be eligible for the death penalty, should in fact be sentenced to death. The *Stephens* Court concluded that, since *Gregg* upheld such a statute leaving broad discretion in the hands of the jury during the weighing process, aggravating circumstances play a constitutional role of guiding sentencer discretion only in determining eligibility for the death penalty, and not during the process of considering aggravating and mitigating circumstances.

This assertion conflicts with the Court's statement in *Gregg* that aggravating circumstances serve the useful function of making death sentences reviewable because they allow the reviewing court to examine the "factors [the sentencer] relied upon in reaching its decision."[166] In addition, statutory lists of aggravating circumstances do in fact perform a constitutionally mandated role of guiding juror discretion by informing jurors about those factors that "the State . . . deems particularly relevant to the sentencing decision."[167] As numerous commentators have argued, the lists of statutory factors when read to the jury can have a pervasive effect on the jury's sentencing deliberations.[168] Moreover, in two cases decided the same day as *Furman,* the Court invalidated two capital statutes that gave the sentencer broad discretion during the weighing stage of deliberations.[169] Consequently, the *Stephens* Court's interpretation of *Gregg* permitting open-ended discretion during the critical stage at which the sentencer determines whether a capital defendant should live or die directly contravenes Court precedent.

Second, the *Stephens* Court supported its conclusion permitting consideration of nonstatutory aggravating factors by inappropriately citing *Lockett* and its requirement of unlimited consideration of mitigating circumstances.[170] The *Stephens* Court's reliance on the principles of *Lockett,* however, conflicts with the policies announced in earlier Court decisions, and with *Lockett* itself.

166. *Gregg,* 428 U.S. at 195.

167. *Id.*

168. *See, e.g.,* Comment, *supra* note 46, at 717-17, n. 145 (citing various sources that note effect of jury instructions).

169. Stewart v. Massachusetts, 408 U.S. 845; Moore v. Illinois, 408 U.S. 786 (1972). *See* Comment, *supra,* note 46, at 716-17 for an analysis of the inconsistency between the Court's holdings in *Stewart* and *Moore,* and the *Stephens* Court's conclusions.

170. Zant v. Stephens, 462 U.S. 862, 879 (1983).

In *Lockett,* the Court's overarching concern was that the sentencer not be precluded from giving "independent weight" to any *mitigating* factors the defendant might wish to establish.[171] Consequently, the Court accorded broad sentencer discretion with regard to those factors that might support the jury in granting mercy. No such concern was expressed with regard to aggravating factors. In fact, in *Proffitt v. Florida,*[172] the Court approved the Florida death penalty statute *limiting* jury consideration of aggravating circumstances to those enumerated in the statute.[173] This holding leads to the conclusion that the severity and irrevocability of the death penalty require reliability, and thus limited discretion, when the decision to *impose* the death penalty is at stake, not solely when determining eligibility. The requirement of unlimited individualization should therefore not extend to jury consideration of aggravating circumstances, contrary to the Court's implication in *Stephens.* Four years after *Stephens,* the Court acknowledged this reading of its earlier decisions in *McCleskey v. Kemp.*[174] Recognizing that it had established different standards for consideration of mitigating and aggravating circumstances, the Court stated that although "the Constitution limits a state's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to *decline to impose* the death sentence," its discretion to *impose* capital punishment must be narrowed by "carefully defined standards."[175]

This analysis provides the resolution to the "seeming conflict"[176] or "paradox"[177] between the policies outlined in *Furman* and *Lockett.* While *Furman* and *Gregg* advocated that sentencer discretion be "focused" and "guided," the *Woodson-Lockett* line of cases[178] established that jurors must be given wide discretion to consider the circumstances of each case and to determine how much weight to give each particular

171. *Lockett,* 438 U.S. at 577-608; *see supra* notes 42-51 and accompanying text.

172. 428 U.S. 242 (1976).

173. The statute provides that "[a]ggravating circumstances shall be limited to the following," and then lists eight factors. FLA. STAT. ANN. § 921.141(5) (Supp. 1976-77) (current version at *id.* (West Supp. 1989)).

174. 481 U.S. 279 (1987).

175. *Id.* at 304 (emphasis in original).

176. Comment, *supra* note 46, at 698. Justices White and Rehnquist, in their separate opinions in *Lockett,* argued that the Court's grant of wide discretion to consider mitigating circumstances constituted a return to the unguided discretion condemned in *Furman. Lockett,* 438 U.S. at 621-24 (White, J., concurring), 629-33 (Rehnquist, J., concurring). *See also* Gillers, *supra* note 1, at 34-38, (noting *Lockett's* potential conflict with *Furman*); Hertz & Weisberg, *supra* note 36, at 373-76 (noting the seeming conflict between *Furman* and *Lockett,* but arguing that the cases are "entirely consistent").

177. *See* Radin, *supra* note 20, at 1148-55 (Asserting that *Furman* and *Lockett* created a paradox—the "dilemma of discretion"—in that "[t]he achievable or imaginable level of individualization varies inversely with the achievable or imaginable level of consistency." *Id.* at 1149-50).

178. *See supra* notes 37-51 and accompanying text.

factor. Because only the consideration of aggravating factors can lead to a death sentence,[179] adequate guidance is necessary only with regard to the sentencer's consideration of *aggravating* factors.[180] As the *Gregg* Court explained, *Furman*'s guidance requirement was never intended to restrict the freedom of sentencers to exercise mercy.[181] Consequently, "*Furman* only precludes capricious imposition of the death penalty and not capricious imposition of mercy."[182] Considered in light of the Court's concerns in *Furman,* both *Lockett* and *McCleskey* support the conclusion that sentencer discretion should be limited with respect to aggravating circumstances, rather than left wide open as the Court asserted in *Stephens.*

D. Violating the Principles of *Lockett v. Ohio*

The United States Supreme Court stated in *Lockett v. Ohio*[183] that "the sentencer, in all but the rarest kinds of cases, [must] not be precluded from considering, *as a mitigating factor,* any [evidence] that the defendant proffers as a basis for a sentence less than death."[184] This holding is often cited for the proposition that consideration of mitigating circumstances may not be limited.[185] When considered in light of the problems with "two-edged" mitigating factors, however, this requirement takes on new significance. If the sentencer inappropriately treats a factor such as mental illness as an aggravating circumstance, then the sentencer has not given "independent mitigating weight" to that mitigat-

179. Aggravating circumstances control the decision to impose death for two reasons: 1) In all states, the sentencing authority is required to make a finding as to at least one statutory aggravating circumstance; and 2) Under virtually all of the "guided discretion" statutes, the death sentence may be imposed only if the balance of factors weigh on the side of aggravation.

180. *See* Goodpaster, *The Year for Life: Effective Assistance of Counsel in Death Penalty Cases,* 58 N.Y.U. L. REV. 299, 314-15; Hertz & Weisberg, *supra* note 36, at 374-76; Comment, *supra* note 46, at 699.

181. The *Gregg* plurality wrote:

> Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution. *Furman* held only that, in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant.

Gregg v. Georgia, 428 U.S. 153, 199 (1976) (footnote omitted).

182. Comment, *supra* note 46, at 699.

183. 438 U.S. 586 (1978).

184. *Id.* at 604 (footnotes omitted) (emphasis in original).

185. *See, e.g.,* Penry v. Lynaugh, 109 S. Ct. 2934, 2949, 2952 (1989) (absence of jury instructions defining "deliberately" may preclude jury from giving effect to mitigating evidence as it relates to personal culpability; absence of instructions on option to decline to impose death may preclude jury from giving effect to mitigating evidence); Mills v. Maryland, 108 S. Ct. 1860, 1870 (1988) (instructions and verdict form that suggested that jury was precluded from considering any mitigating circumstance unless all 12 jurors agreed that the circumstance applied in the case held invalid).

ing factor, although consideration of that factor was not procedurally impaired. Consequently, a statute that does not adequately guide the sentencing authority to prevent the misapplication of mitigating evidence fails to address the concerns of *Lockett* and is therefore unconstitutional.

Prosecutors, judges, and states themselves have rebutted this line of reasoning by arguing that statutes cannot preclude sentencers from considering mitigating evidence because *Lockett* guarantees capital defendants the opportunity to present any and all potentially relevant evidence in support of mitigation.[186] Thus, the argument continues, the defendant in any given case will have had an unlimited opportunity to present to the sentencer all of the mitigating evidence in the case.

The Supreme Court, however, has insisted repeatedly that the mere opportunity to present mitigating circumstances does not fulfill the constitutional requirement that the defendant receive an individualized sentencing hearing. Rather, the statute or the court through its instructions to the jury must ensure that the sentencer is able to consider and give effect to mitigating evidence. As the Supreme Court made clear in *Gregg v. Georgia,* "the provision of relevant information under fair procedural rules is not alone sufficient to guarantee that the information will be properly used in the imposition of punishment, especially if sentencing is performed by a jury."[187]

The Court, in *Hitchcock v. Dugger,*[188] recently reaffirmed the principle that the mere opportunity to present unlimited mitigating circumstances, guaranteed by *Lockett,* does not ensure adequate jury consideration of the mitigating evidence. In *Hitchcock,* the prosecutor, referring to the state statute listing mitigating factors by number, told the jury during closing argument "to consider the mitigating circumstances and *consider those by number.*"[189] The trial judge accordingly instructed the jury to consider only those mitigating circumstances listed in the Florida statute, in clear violation of the *Lockett* principle of unlimited opportunity for mitigation.

The Eleventh Circuit upheld the sentencing proceedings, however, holding that the presentation of the evidence and defense counsel's argument to the jury to "consider the whole picture, the whole ball of wax," were sufficient to show that the defendant had received an "individualized sentencing hearing" in compliance with *Lockett.*[190] The Supreme Court reversed, stating that "it could not be clearer" that the jury and judge were precluded from considering evidence of nonstatutory mitigat-

186. *See Lockett,* 438 U.S. 604-05 (statutes may not preclude sentencer consideration of any circumstances proffered as a basis for a sentence less than death).

187. 428 U.S. 153, 192 (1976).

188. 481 U.S. 393 (1987).

189. *Id.* at 398.

190. Hitchcock v. Wainwright, 770 F.2d 1514, 1517-18 (11th Cir. 1985) (en banc), *rev'd sub nom.* Hitchcock v. Dugger, 481 U.S. 393 (1987).

ing circumstances, and that "the proceedings therefore did not comport with the requirements of . . . *Lockett v. Ohio.*"[191]

The Fifth Circuit also rejected arguments that defense counsel's opportunity to argue unlimited mitigating evidence may take the place of a statute or adequate jury instructions that inform jurors that they may consider and give effect to all mitigating evidence. In *Spivey v. Zant,*[192] for instance, the district court had found that the jury had been adequately instructed on mitigation because the defendant's lawyer had "strenuously argued to the jury that it should consider certain mitigating circumstances in determining sentence."[193] The Fifth Circuit flatly rejected the district court's finding, stating simply that " 'arguments of counsel cannot substitute for instructions by the court.' "[194]

In *Penry v. Lynaugh,*[195] Texas defended its sentencing scheme before the Fifth Circuit, asserting that defendant's counsel "could, and did, argue the mitigating circumstances to the jury."[196] Again, the court noted that defense counsel's arguments may not substitute for adequate provisions ensuring that the sentencer is able to act upon mitigating evidence. "[T]he mere fact that counsel argued mitigating circumstances does not conclude the matter. The question is whether the jury could act on the mitigating circumstances and not impose the death penalty."[197] In its decision in *Penry,* the Supreme Court reiterated this principle, stating that, "it is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing sentence."[198]

Modern sentencing schemes, by failing to ensure that the range of potentially relevant mitigating evidence remains unlimited, fail to meet the constitutional standards set out in *Lockett.* As these cases show, the mere opportunity to present mitigating evidence does not guarantee that *Locketts'* requirements are met.

191. Hitchcock v. Dugger, 481 U.S. 393 (1987).

192. 661 F.2d 464 (5th Cir. 1981), *cert. denied,* 458 U.S. 1111 (1982).

193. *Id.* at 472 n.12.

194. *Id.* (quoting Taylor v. Kentucky, 436 U.S. 478, 488-89 (1978)). *See also* Bell v. Watkins, 692 F.2d 999, 1012 n.13 (5th Cir. 1982), *cert. denied,* 464 U.S 843 (1983), in which the court stated: "Counsel's argument to the jury describing mitigating, or for that matter aggravating circumstances, does not make up for the court's failure to give proper instructions."

195. 832 F.2d 915 (5th Cir. 1987), *aff'd in part, rev'd in part,* 109 S. Ct. 2934 (1989).

196. *Id.* at 925.

197. *Id.* at 926.

198. Penry v. Lynaugh, 109 S. Ct. 2934, 2947 (1989) (citing Eddings v. Oklahoma, 455 U.S. 104 (1982)).

IV. Some Solutions to the Problem of Jury Guidance and Ambiguous Mitigating Factors

There are several ways to amend death penalty statutes to cure the problems associated with the improper consideration of mitigating factors. Statutes could require that jury instructions inform the jury about the penological justifications for capital punishment. These provisions would help to ensure that the jury's consideration of mitigating and aggravating circumstances is consistent with the death penalty's underlying justifications. Additionally, or alternately, instructions could be required that define mitigating and aggravating circumstances. Finally, statutes could require that instructions be provided regarding each mitigating factor proffered by the defendant.

A. Instructions Regarding Penological Justification

The Supreme Court held in the 1976 Cases that a punishment must serve some recognized penological justification to avoid constituting a gratuitous infliction of pain in violation of the eighth amendment's prohibition of cruel and unusual punishment.[199] In *Gregg v. Georgia,* the Court identified the two primary justifications for the death penalty as retribution and deterrence.[200] If the Court is indeed intent on ensuring that death sentences are imposed in accordance with these principles, the logically necessary step is to require that sentencers be instructed about these purposes and their relation to mitigating and aggravating factors. In this way, sentencers will be able to evaluate the evidence in accordance with the death penalty's underlying penological rationales.[201]

The manner in which such instructions could address the deficiencies in modern death sentencing procedures can be seen by examining how an ambiguous factor, such as a defendant's subnormal mental or emotional condition, would be considered under this scheme. The jury might be informed as to how the state intends the goals of capital punishment to be analyzed. For example, the court might be required to explain that the need for vengeance should diminish in accordance with the defendant's degree of culpability for her actions.[202] Additionally, the court might explain that the need for, and value of, making the defendant

199. *See, e.g.,* Gregg v. Georgia, 428 U.S. 153, 182-83 (1976).

200. 428 U.S. at 183.

201. *See* People v. Jackson, 28 Cal. 3d 264, 354, 618 P.2d 149, 188, 168 Cal. Rptr. 603, 642 (1980) (plurality opinion), *cert. denied,* 450 U.S. 1035 (1981); Liebman & Shephard, *supra* note 7, at 785; Comment, *supra* note 46, at 711-12 n.117.

202. *See, e.g.,* MODEL PENAL CODE § 4.02(2) Comment (Tent. Draft No. 4, 1955) (impaired mental capacity included as a mitigating factor because it reduces responsibility and is especially critical in jurisdictions with strict insanity defense); Liebman & Shephard, *supra* note 7, at 811 n.240 (justified retribution "must be scaled to the degree of societal condemnation, which in turn depends on the moral turpitude of the defendant").

atone for her wrongs similarly is reduced as the defendant's ability to conform her conduct or appreciate its consequences is reduced because of mental or emotional dysfunction.[203] Finally, the court could inform the jury that the value of deterrence should diminish as the ability of reasonable persons to identify with the defendant decreases.[204] Under such instructions, a jury confronted with evidence of a defendant's subnormal mental and emotional development should recognize and identify it as a mitigating factor.[205]

Such instructions would address many of the inadequacies of modern death statutes. First, they provide direct guidance regarding critical goals that the Supreme Court insists must be fulfilled in sentencing a defendant to death.[206] Because such goals would be paramount in any state's consideration of factors to include in its jury instructions, it would be less likely that truly mitigating factors would be improperly weighed on the side of aggravation. Second, because the jury will have been "apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information,"[207] the jury's determination of the aggravating or mitigating nature of a particular factor should be consistent with the underlying justifications for capital punishment.[208] Finally, the implementation of this scheme would work to ensure that an ambiguous mitigating factor will be considered as a mitigating factor in accordance with *Lockett v. Ohio,*[209] since the sentencer will be better equipped to identify factors that should favor leniency.[210]

203. *See* Liebman & Shephard, *supra* note 7, at 808-09 (commentators from Coke and Hume through modern scholars agree that mental disorders reduce the justification for expiative punishment).

204. *See id.* at 816 (abnormal offenders so distinguishable from other members of society that punishment not likely to deter others); *Gregg,* 428 U.S. at 186 (many of the post-*Furman* statutes—presumably those identifying mental and emotional disturbance and the like as mitigating factors—reflect an effort to define those criminals for which capital punishment is most probably an effective deterrent).

205. The reduced culpability of the defendant would diminish the justification for seeking vengeance and requiring atonement. Also, though the value of general deterrence would not likely change greatly between a normal and abnormal defendant, in this situation the deterrence value of capital punishment would clearly be diminished.

206. *See Gregg,* 428 U.S. at 183 ("[s]anction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering").

207. *Id.* at 195.

208. *See* Hertz & Weisberg, *supra* note 36, at 367-73 (instructions regarding underlying the goals of capital punishment necessary to ensure that those goals are met in sentencing—lay jurors may not understand that a factor can mitigate by disproving the retributive and deterrent value of a death sentence).

209. 458 U.S. 586 (1978).

210. Hertz & Weisberg, *supra* note 36, at 369 (instructions regarding goals of capital punishment are necessary to ensure that the sentencer fully considers the mitigating nature of the evidence).

B. Instructions Defining Mitigating and Aggravating Circumstances

The abstract nature of an inquiry into the stated goals of capital punishment, however, may lessen the effectiveness of such a solution. Thus, in addition to or instead of instructions about penological goals, the court should define mitigating and aggravating circumstances for the jury and explain how such factors should be considered under the state statute. Although many courts seem to believe that jurors know what mitigation is,[211] the problems that have arisen regarding the misuse of mitigating evidence indicates that such instructions are necessary. Because the Supreme Court has suggested that this problem implicates due process,[212] such instructions may be necessary if constitutional guarantees are to be adequately protected.[213]

The curative effect of focusing instructions upon the constitutional deficiencies of modern death penalty statutes would be identical to that of instructions regarding the penological goals of capital punishment.[214] Juries might also be better able to properly identify mitigatory evidence and include it in their consideration of mitigating factors.

C. Instructions Regarding Each Mitigating Factor

The difficulty with a solution that relies solely on the focusing instructions described above is that such instructions may fail to address the concerns of *Lockett* that the sentencer give "independent mitigating weight" to all mitigating evidence put forward in the case. Presented by defense counsel with a mass of unrefined evidence and argument concerning the defendant's character, psychological condition, and the circumstances of the crime, the sentencer may well fail to understand that it can consider each of the factors "as an independent basis for mitigating sentence."[215] *Lockett* thus compels the conclusion that juries in capital cases must be instructed as to *each mitigating factor* proffered by the defendant. Itemizing the mitigating circumstances in this way would not only go far to ensure that juries do not mischaracterize and misuse am-

211. *See* People v. Jackson, 28 Cal. 3d 264, 316, 618 P.2d 149, 176, 168 Cal. Rptr. 603, 630 (1980), *cert. denied,* 450 U.S. 1035 (1981) (nature of enumerated factors "self-evident").

212. *See* Zant v. Stephens, 462 U.S. 862, 885 (1983).

213. The Fifth and Eleventh Circuits have held that such focusing instructions are required by the Constitution. As the court stated in Spivey v. Zant, 661 F.2d 464 (5th Cir. 1981), *cert. denied,* 458 U.S. 1111 (1982), the requirement of guided and focused consideration of mitigating and aggravating circumstances means:

> in most cases . . . that the judge must clearly and explicitly instruct the jury about mitigating circumstances and the option to recommend against death; in order to do so, the judge will normally tell the jury what a mitigating circumstance is and what its function is in the jury's sentencing deliberations.

Id. at 471.

214. *See supra* notes 199-210 and accompanying text.

215. Hertz & Weisberg, *supra* note 36, at 346.

biguous mitigating factors, but would also ensure that the jury is able to consider the "independent mitigating weight" of each of the factors put forward by the defendant.

Such instructions also would serve the function of calling the attention of the jury to nonstatutory mitigating factors, as well as to those already enumerated by statute. Given the pervasive effect that jury instructions potentially have upon sentencing deliberations,[216] the requirement set forth by the Supreme Court in the 1976 Cases that the sentencer be given "specific and detailed guidance"[217] in making its sentencing determination virtually compels the conclusion that constitutional death penalty sentencing requires itemized instructions regarding mitigating circumstances.

Conclusion

In its landmark death penalty decisions in 1976, the Supreme Court set out to make rational the procedures through which states authorize their citizens to impose society's ultimate criminal sanction. Since that time, the standards established by the 1976 Court have undergone a continuing process of evaluation and refinement.

The Court's decisions have addressed the problems of reliability and fairness by establishing two fundamental constitutional requirements for death penalty sentencing: individualization and guidance. States have responded to these requirements by establishing sentencing schemes requiring the jury to balance mitigating and aggravating circumstances to determine whether execution is justified. It has become apparent, however, that reliability and fairness have been thwarted under these schemes because they permit potentially ambiguous mitigating factors to be considered in aggravation. Consequently, modern death penalty statutes fail to ensure that capital defendants are accorded their constitutionally mandated procedural rights. This Note argues that the problem can be remedied by providing generalized instructions about the justifications for capital punishment or about mitigating and aggravating circumstances themselves, or by requiring instructions about each mitigating circumstance presented by the defendant.

216. *See* Quercia v. United States, 289 U.S. 466, 470-72 (1933) (instructions to jury may carry controlling weight); Hertz & Weisberg, *supra* note 36, at 346 (express reference to particular facts or issues in jury instructions helps jurors to remember factors described in instructions, helps jurors understand legal theory of the party introducing the evidence and relevancy of evidence to that theory, and cloaks that theory in the authority and credibility of the judge); Severence & Loftus, *Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions,* 17 LAW & SOC'Y REV. 153, 194-95 (1982) (instructions on target legal concepts and issues increase the sentencer's concentration on the evidence underlying such concepts and issues).

217. Proffitt v. Florida, 428 U.S. 242, 253 (1976).

Fewer than twenty years ago, procedural rights that United States citizens now deem fundamental and irrevocable were often only the idealized visions of thoughtful champions of constitutional rights. No less is true of the development of procedural rights under the law of capital punishment. It is by now a fundamental tenet of eighth amendment jurisprudence that the proscription against cruel and unusual punishments "draws much of its meaning from 'the evolving standards of decency that mark the progress of a maturing society.' "[218] The constitutionality of particular aspects of the death penalty is therefore dependent upon the Supreme Court's perception of society's prevailing standards of decency.[219]

This Note has shown that disparate voices have expressed concern over a specific and curable deficiency in modern capital sentencing procedures. The Supreme Court, too, in *Zant v. Stephens*[220] and *Penry v. Lynaugh*[221] indicated that it recognizes the problem of improper consideration of ambiguous mitigating factors. The Court misapprehended, however, the nature and scope of this problem. Perhaps it is only a matter of time before the adoption of more rational sentencing guidelines that address this issue becomes the standard to which our maturing society aspires, and that our Constitution would then require.

218. 428 U.S. 280, 301 (1976) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion).

219. *See id.* ("North Carolina's mandatory death penalty statute for first-degree murder departs markedly from contemporary standards respecting the imposition of death and thus cannot be applied consistently with [the Constitution]"); Penry v. Lynaugh, 109 S. Ct. 2934, 2955 (1989) ("[A]t present, there is insufficient evidence of a national consensus against executing mentally retarded people convicted of capital offenses for us to conclude that it is categorically prohibited by the Eighth Amendment.").

220. 462 U.S. 862 (1983).

221. 109 S. Ct. 2934 (1989).